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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Midwest Bus Corporation

Serial No. 76393583

Molly Basile Markley and Andrew R. Basile of Young & Basile,  
P.C. for Midwest Bus Corporation.

Allison P. Schrody, Trademark Examining Attorney, Law Office  
115 (Tomas V. Vlcek, Managing Attorney).

Before Hohein, Bucher and Walsh, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Midwest Bus Corporation seeks registration on the  
Supplemental Register of the mark **BYK-RAK** in standard  
character form for goods identified in the application, as  
"racks for vehicles for use in transporting bicycles, in  
particular, a rack for a bus transporting bicycles" in  
International Class 12.<sup>1</sup>

<sup>1</sup> Application Serial No. 76393583 was filed on the Principal Register on April 10, 2002 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. On November 14, 2003, applicant filed an Amendment to Allege Use (AAU) alleging first use anywhere at least as early as April 2, 2003 and use in commerce at least as early as September 17, 2003. At the same time, applicant amended this application to the Supplemental Register.

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon the ground that this term is incapable of functioning as a trademark for the goods set forth above. Section 23 of the Trademark Act, 15 U.S.C. § 1091.

Applicant and the Trademark Examining Attorney have fully briefed the case, but applicant did not request an oral hearing. We affirm the refusal to register.

**Summary of the arguments**

Applicant argues that the term "bike rack" is not generic for its goods, but rather is merely descriptive. Furthermore, applicant contends that BYK-RAK "is more than a mere misspelling, but a creative and distinguishing makeup of words that create a distinctive commercial impression." Because "both words in Applicant's mark are creatively misspelled," its "distortion of the terms ["bike" and "rack"] are significant." Applicant also points out that these misspelled/distorted words are "connected into one word by the hyphen."

By contrast, the Trademark Examining Attorney argues that "the public commonly understands the term 'bike rack' to refer to any holder for a bicycle, whether attached to the ground, a building, or a vehicle such as a bus."

Furthermore, the Trademark Examining Attorney argues that the genericness of a mark *must* be considered in association with the goods to which the mark applies, so that "the question of whether the spelling or pronunciation of BYK-RAK is obvious must always be considered in relation to applicant's goods - bike racks for buses. She contends that applicant's particular spelling of the term "bike rack" as BYK-RAK "is neither creative nor distinguishing."

### **Procedural Matter**

Before turning to the merits of the appeal, we must first direct our attention to a procedural matter. The Trademark Examining Attorney has objected to a reference that applicant made in its brief to a third-party registration. The Trademark Examining Attorney is correct in that the record in any application should be complete prior to appeal. 37 C.F.R. § 2.142(d). Inasmuch as the reference to the third-party registration was made for the first time with applicant's appeal brief, we have not considered it.<sup>2</sup>

### **The law of genericness**

A term is generic if it names the class of the goods or services to which it is applied. See In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir.

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<sup>2</sup> We hasten to add that even if we had considered this registration, it would not have changed our decision herein.

2001), citing H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986); Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985). The test for determining whether a term is generic is its primary significance to the relevant public, that is, whether the term is used or understood, by purchasers or potential purchasers of the goods or services at issue, primarily to refer to the class of such goods or services. Section 14(3) of the Act; In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); Magic Wand Inc. v. RDB Inc., *supra*; In re Merrill Lynch, Pierce, Fenner, and Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987); H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., *supra*; and In re Leatherman Tool Group, Inc., 32 USPQ2d 1443 (TTAB 1994). Evidence of the relevant public's understanding of a term may be obtained from any competent source, including direct testimony of consumers, consumer surveys, newspapers, magazines, dictionaries, trade journals, catalogs, and other publications. See In re Merrill, Lynch, Pierce, Fenner, and Smith, Inc., *supra*, and In re Northland Aluminum Products, Inc., *supra*.

## **ANALYSIS**

We turn then to an analysis of how the law on genericness applies to the facts of this case. Initially, we find that the relevant public for these goods would be a more limited group than all ordinary consumers. Prospective purchasers would be primarily buyers for transit systems. While this may be a group of buyers having greater sophistication than the ordinary consumer, there is nothing in the record to suggest that this population uses the term "bike rack" differently than ordinary consumers, newspaper writers or those designing websites for bike riders using city buses, as seen below.

### **The Trademark Examining Attorney's evidence**

The record includes dictionary definitions of the component terms "bike"<sup>3</sup> and "rack."<sup>4</sup> The Trademark Examining Attorney placed into the record publication excerpts from news articles in the Lexis-Nexis database showing the usage and meaning of the composite term "bike rack" in reference to bike racks, and all of the excerpts are about racks attached to the front of buses for transporting bicycles:

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<sup>3</sup>     **"Bike** (bīk) noun (1) A bicycle" ..., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (3<sup>rd</sup> Edition 1992).

<sup>4</sup>     **"Rack** (rāk) noun (1)(a) A framework or stand in or on which to hold, hang or display various articles ..., " THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (3<sup>rd</sup> Edition 1992).

North Fulton commuters are getting another option for the trek downtown. MARTA began installing **bike racks** on the front of its buses last month.<sup>5</sup>

The bikers' requests include outfitting all Metro buses with **bike racks**, training drivers to give greater clearance to bikers and improving markings at crosswalks.

Patti Muck, a Metro spokeswoman, said Metro was planning to add **bike racks** to its buses earlier this year.<sup>6</sup>

Other efforts include new signs, improvements at shelters and **bike racks** on the front of buses.<sup>7</sup>

They have been expanding their Bike & Ride program to include **bike racks** on a large number of buses. The **bike racks** carry two bicycles each, are mounted to the front of the bus, and take as little as 30 seconds to load.<sup>8</sup>

Fixed-route buses will be equipped with front-mounted **bike racks**. To request a "Bike on the Bus" brochure, call 226-1144.<sup>9</sup>

Some Bi-State buses have **bike racks** mounted on the front.<sup>10</sup>

The Trademark Examining Attorney has also placed into the record a variety of examples of usage from the Internet:

Sportworks designed the **Bike-Rack-for-Buses** ...  
... fold down the **bike rack**. You only need to use one  
hand to unlatch and pull the **bike rack** down ...  
<http://www.bicycleracks.com/sbhow.asp>

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<sup>5</sup> Atlanta Journal-Constitution, July 11, 2002.

<sup>6</sup> Houston Chronicle, July 5, 2002.

<sup>7</sup> Kansas City Star, June 28, 2002.

<sup>8</sup> Chicago Daily Herald, June 26, 2002.

<sup>9</sup> Dayton Daily News, June 30, 2002.

<sup>10</sup> St. Louis Post-Dispatch, June 29, 2002.

SCMTD **Bike Rack** Program

Santa Cruz Metropolitan Transit District (SCMTD) buses are equipped with front-mounted **bike racks** ...  
<http://www.scmttd.com/changes/bikerack.html>

**Bike Rack for Buses at AMTRAN**

... [The] rider lowers the **rack** with one hand while supporting the **bike** with the other hand. ... this durable **rack** is as easy to raise as it is to lower. .... After lowering the **rack**, the rider places the **bike** into either of the **rack's** wheel wells. .... The most impressive feature of the **Bike-Rack-For-Buses** is its self-storing support arm. .... The **rack** contacts the **bicycle's** tires only, no contact is made with the frame of the **bicycle**, reducing any potential damage to a loaded **bicycle**.  
<http://www.amtran.org/psu/bikerack.htm>

**BIKE RACKS ON BUSES**

CityBus has **bike racks** on most buses ...

HOW TO USE THE **BIKE RACK**

Each **rack** located at the front of the bus holds up to two bikes. Simple instructions are posted right above the **rack**. No extra fare is charged, and the driver is happy to show you how the **rack** works.

...

WHICH ROUTES HAVE **BIKE RACKS**?  
<http://www.gocitybus.com/bikeracks.htm>

**BIKE RACKS.**

If the bus arrives with the **bike rack** folded against the bus, release it by pulling the handle up and lowering the **rack**. ... The **rack** is labeled for your convenience. Lift your **bicycle** onto the **rack**. ...

[http://www.cata.org/bikes\\_racks.html](http://www.cata.org/bikes_racks.html)

## Sales keep rolling along for maker of Bike-Rack-for-Buses

Thursday, March 21, 2002

By MARNI LEFF

SEATTLE POST-INTELLIGENCER REPORTER

After seeing an ad soliciting designs for **bike racks** to mount on King County Metro buses, Mike Reeves thought, "I can do this."

That was almost a decade ago, and now his **Bike-Rack-for-Buses** invention can be spotted on Metro's entire 1,300-bus fleet. The **racks** are also on buses in about 400 other cities.

Reeves, who has a degree in oceanography and a knack for engineering, said the Metro order transformed his company, Sportworks, from a contract manufacturer into a business with a product of its own.

"That really got us going," Reeves said. "It gave us a lot of credibility."



Qui Lam works on a bus bicycle rack at Sportworks in Woodinville. The order from Metro transformed the company from a contract manufacturer into a business with its own product. Phil H. Webber / Seattle Post-Intelligencer

Linda Thielke, a spokeswoman for Metro, said the county first began experimenting with **bus racks** in the 1980s.

"We had **racks** that we made ourselves on buses that crossed (state Route) 520 because bikes weren't allowed on the bridge," she said.

"The problem was that every time we washed a bus, we had to take the homemade **racks** off because they got tangled in the bus washer."

The Sportworks **bike racks**, Thielke said, don't need to be removed to clean the buses.

The Woodinville company's biggest customer is the Los Angeles County Metropolitan Transportation Authority, which has purchased 2,000 **bike racks for its buses**, according to Lisa Robinson, product manager for Sportworks.

The **bike racks** cost about \$570 per bus, Robinson said, declining to say how many **racks** the company sells in a year or to disclose annual sales figures.

As the **bus-mounted bike racks** became more visible, Reeves said, car and recreational vehicle owners began calling and stopping by company headquarters.

In 1996, Sportworks introduced a **rack** for private vehicles. That **rack** starts at \$220 for a two-bike model. A top-of-the-line, four-bike model retails for \$550.

Sportworks, which started out as a contract manufacturer making handlebars for bicycles, has grown to 65 employees. When Reeves started the company in 1990 with his wife, Sandi, the pair were its only workers.

In September, the company hired Dave Bartholomew, former president and chief executive of Mountain Safety Research, to be president.

Under his leadership, Reeves said, Sportworks will continue to expand and improve its product lines.

Robinson said the company's forte is **bike racks**, for both cars and buses, though it still does some contract work.

She declined to say what portion of the company's annual sales stem from its **racks**.

Inside Sportworks' factory around lunchtime yesterday, boxes of **bike racks** were stacked, waiting to be shipped to transit authorities and bus makers across the country.

Robinson estimates that 500,000 bikes are transported on **racks** made in the local factory each month.

Rich Olken, executive director of the Bikes Belong Coalition, a Brookline, Mass.-based trade organization, said **bus racks** encourage commuters to ride.

"The moral of the story is people who bike to work are secure about being able to get home," he said.

"If the weather doesn't cooperate, the interface between transit and personal transportation allows someone to take the bus home and ride to work the next day."

To that end, Olken said, Sportworks -- which is active in Bikes Belong -- meets an important need.

"We're just tremendously tickled that someone invented that," he said. "Automobiles and trucks for years have had **bike racks**. To create something that is heavy-duty enough (for buses) and so easy to use is just tremendous."

[http://seattlepi.nwsourc.com/business/63174\\_bend21.shtml](http://seattlepi.nwsourc.com/business/63174_bend21.shtml)



### **Category of Goods**

In its application, applicant identified its goods as "racks for vehicles for use in transporting bicycles, in particular, a rack for a bus transporting bicycles." There can be no dispute based on the evidence in the record that the category of goods involved in this case is "bike racks," or even tracking more closely applicant's identification of goods, a bike rack that is attached to a bus.

### **Understandings of the relevant public**

We next must determine whether the designation BYK-RAK is understood by the relevant public primarily to refer to that genus of goods. We find that the evidence placed into the record by the Trademark Examining Attorney demonstrates that members of the relevant public understands the term "bike rack" to refer to a holder for a bicycle, whether attached to the ground, a building, or a vehicle, such as a bus. While applicant concedes that "bike rack" may be descriptive of such a rack on the front of a city bus, we find the evidence compelling that this is the commonly accepted name of this kind of device. In an oft-quoted analogy, a mark answers the question of "Who are you?" or "Where do you come from?" The name of the product answers

the question of "What are you?"<sup>11</sup> If the question "What are you?" were to be put with respect to a rack for bicycles mounted on the front of a city bus, "bike rack," spelled correctly, clearly answers the query most succinctly.

In further support of registrability, even if the term "bike rack" were to be found to be generic, applicant argues that its alleged mark, BYK-RAK, is more than a mere misspelling, but is a creative set of words that creates a distinctive commercial impression. In her appeal brief, the Trademark Examining Attorney takes issue with each of applicant's specific arguments:

Applicant argues ...[that] its "spelling of bike as 'byk' is not obvious, and the pronunciation can only be known by using it in association with the goods."

Applicant's argument falls short in two respects. First, the examining attorney points out the genericness of a mark *must* be considered in association with the goods to which the mark applies, so the question of whether the spelling or pronunciation of BYK-RAK is obvious must always be considered in relation to applicant's goods, bike racks for buses. Second, the spelling of "bike rack" as BYK-RAK is neither creative nor distinguishing. In its misspelling of the word "bike," applicant merely substitutes the letter 'i' with the letter 'y' (a phonetic equivalent), removes the silent 'e' from the end of "bike," adds a hyphen, and removes the silent letter 'c' from the word "rack."

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<sup>11</sup> See 2 J.T. McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION*, §12.1 (2<sup>nd</sup> Ed. 1998).

Applicant asserts the pronunciation of its mark as "bike rack" is "not obvious." However, most one-syllable words in the English language composed of a consonant plus the letter 'y' (e.g., *by, my, try, fly*) create a word pronounced with the long 'i' vowel sound. For example, the common preposition "by" contains the same long 'i' vowel sound as in the word "bike." In essence, applicant merely adds a 'k' to the end of the common preposition 'by,' immediately creating an obvious phonetic misspelling of the word "bike." Since the letter 'c' in the word "rack" is essentially silent, its removal from the word makes little difference in how a consumer would perceive or pronounce the word "rak" in relation to applicant's goods, bike racks for buses. Thus the examining attorney believes that "bike rack" is the only plausible pronunciation of applicant's proposed mark.

Applicant also asserts its addition of a hyphen between the elements "BYK" and "RAK" distinguishes its mark by making it one term. However, hyphens are often used to link words that modify one another together (e.g., "bike-rack," "back-pack," "ski-slope," etc.). The mere addition of the hyphen to the mark, along with the slight misspellings, does not make the proposed mark "creative," "distinguishing," nor "visually different," as applicant asserts.

We agree with the Trademark Examining Attorney that BYK-RAK will be seen by relevant customers as being an exact phonetic equivalent of the term "bike rack." In fact, the Trademark Examining Attorney discusses how closely the alleged mark in the instant case tracks past cases of misspelled terms refused registration:

A slight misspelling of a word will not turn a descriptive or generic word into a non-

descriptive mark. See C-Thru Ruler Co. v. Needlenian, 190 USPQ 93 (E.D. Pa. 1976) [C-THRU held to be the equivalent of "see-through" and therefore merely descriptive of transparent rulers and drafting aids]; In re Hubbard Milling Co., 6 USPQ2d 1239 (TTAB 1987) [MINERAL-LYX held generic for mineral licks for feeding livestock]; In re Stanbell, Inc., 16 USPQ2d 1469 (TTAB 1990), aff'd, 20 USPQ2d 1319 (Fed. Cir. 1991) [ICE PAK held generic for ice packs]; TMEP §1209.03(j)].

Applying this well-founded principle, applicant's mark BYK-RAK is a slight misspelling and obvious phonetic equivalent of the term "bike rack." Since "bike rack" is the generic term for bike racks mounted on buses to transport bicycles, applicant's mark BYK-RAK, despite its novel spelling, is also generic for bike racks mounted on buses. Applicant's mark is overwhelmingly similar to the above-noted marks MINERAL LYX, ICE PAK, and C-THRU, all of which the Board found to be slight misspellings of generic or descriptive terms whose novel spellings were incapable of adding source-identifying significance. Applicant's argument that its mark is somehow distinguishable is untenable. Applicant argues "BYK-RAK is more than a misspelling, but a creative and distinguishing makeup of words that create a distinctive commercial impression" and its "spelling of bike as 'byk' is not obvious ...."

...  
[However,] applicant's mark bears the greatest similarity to the marks in the cases cited above, e.g., MINERAL-LYX (held generic for mineral licks for feeding livestock), ICE PAK (held generic for ice packs), and C-THRU (held merely descriptive of transparent rulers and drafting aids). The spelling of "bike" as "BYK" is quite similar to the spelling of "licks" as "LYX" because both substitute the letter 'y' as the phonetic equivalent of the letter 'i,' and the spelling of "rack" as "RAK" is identical to the spelling of "pack" as "PAK" in the cited cases. As such, the presentation of the mark

BYK-RAK would never be perceived as "creative and distinguishing" or "fanciful and unique" as advanced by applicant. To the contrary, applicant's mark is a fairly ordinary and obvious misspelling of a generic term in line with the above-cited cases.

Applicant also relies on In re Wella Corp., 565 F.2d 143, 196 USPQ 7 (CCPA 1977) [BALSAM] and In re Carolyn's Candies, 206 USPQ 356 (TTAB 1980), [YOGURT BAR] in



arguing that even a mark that is generic as applied to the goods but has a "distinctive appearance or design feature" is registrable. In Wella, for example, our reviewing tribunal found that the stylized lettering of the mark BALSAM was capable of distinguishing applicant's hair care products.<sup>12</sup> However, we agree with the Trademark Examining Attorney again, that the Wella case is easily distinguishable from the instant case on its facts.

As noted by the Trademark Examining Attorney, applicant's proposed mark includes no stylized lettering or design element as applicant seeks registration of its mark in standard character form. Hence, applicant's mark bears no resemblance to the stylized mark BALSAM whatsoever, which was presented in a stylized font featuring "curlicues" on

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<sup>12</sup> The word "Balsam" is disclaimed apart from the special form in which it is presented.

nearly every letter of the mark, as seen *supra*. The examining attorney notes that:

... [A] similar argument was put forth in *In re Newport Fastener Co. Inc.*, 5 USPQ2d 1064 (TTAB 1987) for the proposed mark TYLE TYE for "strips for holding tile in place on roofs." In that case, the applicant argued the designation TYLE TYE had a "distinctive appearance" and "design features" due to its misspellings that would render the mark capable of distinguishing its goods. The Board distinguished *Wella* and found the applicant's argument "imaginative" but unpersuasive, stating "there is no stylization of the lettering of the designation sought to be registered, nor is there any design in the arrangement or positioning of the letters. Rather, applicant seeks to register TYLE TYE in typed form." *Id.* at 1065.

As in the TYLE TYE case, applicant is seeking registration of its mark, BYK-RAK, in standard character form. However, we note that even if applicant had chosen to submit its drawing in a special form drawing matching its specimens, there would still be nothing in the style of the block lettering that would support registration (even with a disclaimer of "bike rack") of this generic matter:



Accordingly, we find that BYK-RAK, is generic as used in connection with applicant's rack for a bus designed for

transporting bicycles. Despite applicant's variant spelling of this term, we find that it is incapable of providing source-identifying significance to a bike rack.

*Decision:* The refusal to register on the ground of genericness is hereby affirmed.